



## Committee on Professional Ethics

Opinion #498 - 11/3/78 (49-78) Topic: Conflict of interest;  
counsel to professional  
society; disciplinary  
proceedings

Digest: Counsel to state or local  
professional society may  
represent member of that  
society in proceedings  
instituted pursuant to  
Article 130 of Education  
Law only where society  
has neither instituted  
complaint nor seeks to  
discipline member in con-  
nection with related  
matter.

Code: EC 5-1; 5-2; 5-14; 5-15  
and 5-18  
DR 5-105(A) and (B)

### QUESTION

May a lawyer who is counsel to a state or local profes-  
sional society represent a member of that society in proceedings  
relating to professional misconduct instituted pursuant to Arti-  
cle 130 of the Education Law?

### OPINION

The Board of Regents and the Department of Education are  
responsible for the regulation of all of the licensed profes-  
sions in New York State except law. Those responsibilities  
include the administration of proceedings in cases of alleged  
professional misconduct pursuant to Article 130 of the Education  
Law. Education Law §§ 6509, et seq.

There are three basic stages to an Article 130 proceeding  
initiated by the service of charges of professional misconduct:  
(1) a hearing before a panel composed of members of the State  
Board for the profession in question; (2) examination by a  
Regents Review Committee of the transcript and results of the  
hearing, including the recommendation of the panel; and (3)  
final action by the full Board of Regents, determining whether  
the licensee is guilty of the charge and establishing the penalty  
to be imposed in connection with any finding of guilt.

The office of the State Attorney General handles the prosecution of complaints and final decisions of the Board of Regents are reviewable by the Appellate Division for the Third Department.

Licensees appearing either before a panel of their State Board or before a Regents Review Committee are entitled to be represented by counsel. On occasion, the attorney for the licensee charged with misconduct may also be counsel to the professional society of which the licensee is a member. In this latter connection, we are now asked whether it is proper for counsel to a state or local professional society to represent a member of that society at misconduct proceedings instituted pursuant to Article 130 of the Education Law.

While it is not necessary within the context of the statutory schema hereinabove described for a professional society to become involved in the disciplining of its members, certain societies reserve for themselves a separate authority to discipline their members and on occasion may file complaints with the Department of Education that eventuate in Article 130 proceedings. Other professional societies have no disciplinary function whatsoever.

The question posed has not previously been answered in this State and there is little relevant authority to be found elsewhere. The only recorded decision which seems to offer some guidance is an informal opinion of the American Bar Association's Standing Committee on Professional Ethics made two years prior to the adoption of our present Code of Professional Responsibility. That opinion, ABA Inf. 1051 (1968), held it to be improper for a lawyer who was a member of the governing body of a professional society which itself administered or supervised disciplinary hearings to defend a member of that society at any such hearing. The gravamen of that opinion concerned the conflicting loyalties owed by the lawyer to the society on the one hand and to his client on the other.

By a parity of reasoning, we believe that one who serves as counsel to a professional society which instituted a complaint that eventuates in an Article 130 proceeding or a society that would foreseeably discipline a member for misconduct relevant to any such proceeding, should be precluded from undertaking the representation of the accused. Counsel owes his professional allegiance to the society by which he is employed. See, e.g., EC 5-1, EC 5-2, EC 5-14 and EC 5-18. He cannot therefore undertake to defend a person against whom the society has lodged a complaint or defend that person in a proceeding which relates to misconduct that counsel may foreseeably be obliged to use against him. See, DR 5-105(A) and (B); see also, EC 5-14 and EC 5-15.

Where a professional society has neither caused proceedings to be instituted nor may foreseeably discipline a member

for misconduct relevant to such proceedings, however, we believe that it would be permissible for its counsel to appear on behalf of the accused. Under such circumstances, there would be no present or potential conflict of interest. Counsel's allegiance to the professional society by which he is employed could in no way be compromised.

For the reasons stated, subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.

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